No. 81164-4

THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent.

v.

Kenneth Kyllo

Appellant.

Objections to the Answer to Petition for Discretionary

Kenny Kyllo, pro se
PO Box 777
Monroe WA 98272

THE SUPREME COURT

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, **Respondent,** **vs.** **Kenneth Kyllo,** **Appellant.**	**NO. 81164-4** (COA # 32729-5-II) **Objections to the Answer to Petition for Discretionary Review**

a) IDENTITY OF MOVING PARTY

COMES NOW, the Appellant, Kenneth Kyllo, pro se, and respectfully requests the relief designated below.

b) RELIEF SOUGHT

Mr. Kyllo respectfully requests that this Court accept these objections to the State's Answer to Petition for Discretionary Review filed May 19th 2008.

c) **FACTS RELEVANT TO MOTION**

On May 19th Petitioner received a letter from the Court indicating that the State had filed an Answer to the Petition. Petitioner did not receive a copy of the Brief and requested one from the Court Clerk. Petitioner has not heard from counsel as to the filing of a response. Petitioner has therefore filed this timely response in an effort to make the Court aware of his concerns and to give this Court a "fair opportunity to consider and to correct the asserted constitutional defect." *Loonsbury v. Thompson* 374 F.3d 785 (9th Cir. 2004) (citing *Picard v. Connor*, 404 U.S. 270, 276, 92 S. Ct. 509, 30 L. Ed. 2d 438 (1971)).

GROUNDS FOR RELIEF AND ARGUMENT

Throughout the process, Petitioner has had difficulty maintaining contact with Counsel regarding the course of the appeal. As Petitioner is currently serving a Life Without the Possibility of Parole sentence, the need to properly preserve all of his constitutional claims is critical. Under the Anti-terrorism Effective Death Penalty Act (AEDPA) any issues not properly presented are considered forfeited. The writ of habeas corpus plays a vital role in protecting constitutional rights[1] and Mr. Kyllo cannot bring his constitutional claims in federal court unless they are properly preserved.

[1] *Slack v. McDaniel* 529 U.S. 473, 146 L.Ed.2d 542, 120 S. Ct. 1595, 1603. (2000)

For the reasons stated above, appellant respectfully requests this Court to accept these Objections to the State's Answer.

Objections to the State's Answer

Throughout the Appellate Process the State has made factual and legal assertions that do not accurately reflect the testimony presented at trial and conflict with clearly established caselaw. The answer is in keeping with that practice. Petitioner would direct the Court's Attention to the following discrepancies:

1. On page 6 of the Answer, the State blatantly misrepresents the record by stating that Mr. Kyllo and his attorney received notice of the hearing. The State did not notify Mr. Kyllo of the hearing and has not provided any proof that they notified Mr. Kyllo's counsel. The Court even indicated at that hearing that it did not know who Kyllo's attorney was. (See Brief of Appellant page 25) The record is also clear that Mr. Kyllo was in custody at the time and in the same building. He did not have a choice to attend the hearing as the State has represented, because he was behind bars. If the Court had been concerned with his attendance or his right to be present they could have simply sent the bailiff upstairs to Mr. Kyllo's cell and invited him to the hearing. The State's misrepresentation of the facts on this issue is not only

disingenuous, it is a strong corroboration of the governmental misconduct that took place. As Mr. Kyllo has demonstrated that he had a constitutional right to be present and the State has failed to make an affirmative showing that they made any effort to notify him or allow him to attend, this Court should grant review of this issue.

2. The State argues that the "great bodily harm" instruction was an accurate statement of the law. (Answer page 10-15) The State's primary basis for this assertion seems to be a statement by Division 3 that such an instruction in a second degree assault case is "perhaps even an accurate statement of the law." (Answer page 14 citing *State v. Rodriguez* 121 Wn. App. 180, 87 P.3d 1201 (2004)) The State fails to address the ineffective assistance of counsel claim, fails to address the conflict between the decision of this Court in *State v. Walden* and the language of *Rodriguez*, fails to address the fact that the Court did not give a definition for "great bodily harm" but did give one for "substantial bodily injury" nor does the State address the potential for confusion. As Mr. Kyllo has established multiple constitutional questions as well as pointed out a conflict with the state case law, this Court should grant review on this issue.

3. The State seem to argue on page 15-17 of the Answer, that despite the fact that the Court of Appeals made an obvious error (confusing instruction # 7 with proposed defense instruction #6) Mr. Kyllo is not entitled to review of this issue. Mr. Kyllo has addressed an issue of constitutional magnitude, directed the Court to the fact that the an instruction like the one proposed is recommended in some cases by the Washington State Supreme Court and explained the great prejudice he suffered as a result of the failure to give the instruction. The State argues that the fact that the Court of Appeals misread the record amounts to a refusal to address the issue. This could not be further from the truth. The Court of Appeals did review the issue. They simply made a mistake and dealt with instruction #7 instead of proposed instruction #6. Furthermore, the State seems to argue that the changes in RAP 10.10 stand for the assertion that a pro se argument is to be given less attention by the Court. This seems to fly in the face of the long held tradition of the courts to recognize pro se pleadings and allow them to be construed liberally and held to less stringent standards than formal pleadings. (*Haines v. Kerner*, 92 S. Ct. 594 (1972).

New Issue Presented by the State

The State now argues that the Court of Appeals was in error when it ruled that the appearance of fairness doctrine was violated by the testimony form Judge Warning after he had presided over a number of hearing in the present case. (Judge Warning had previously been Mr. Kyllo's attorney)

In The State relies on *State v. Post* and *State v. Chamberlain* to suggest that a preparer of a sentencing report, or the signer of a warrant are equivalent to actual testimony given by a previously presiding judge in the same case. This argument strains the limits of reason.

On pages 18-22 of the Answer, the State argues that actual or potential bias has not been shown. The potential bias is self-evident. Obviously, having one colleague preside while another colleague gives testimony presents a clear potential for bias. That is not a disparagement to either judge, it is simply a matter of human nature. That is why the appearance of fairness doctrine exists. The State greatly misses the point by suggesting that the Court must find something untoward or improper in order to conclude that the proceedings did not satisfy the appearance of fairness doctrine. Any objective viewer would express concern in a proceeding where a judge takes off his robe and become a witness for the state. Mr. Kyllo does not suggest that Judge Warning was doing

something wrong or ill-intentioned. Nevertheless, the appearance of fairness was not evident. A proceeding which involves sending a man to prison for the rest of his life should be completely free from any appearance of impropriety.

On pages 22-29 of the Answer the State lays out a series of cases that seem to stand for two propositions: The Court of Appeals does not have the authority to raise or decide issues on it's own that have not been previously raised and there is not any difference between actual bias and a potential for bias.

The Court of Appeals does have the authority to, consider and decide an issue of law not previously raised or briefed by the parties on appeal, and decide the case on the basis of its resolution of the issue. RAP 12.1(b). See also *State v. Aho,* 137 Wn.2d 736 (1999). The State seems to take the position that *State v. Bolton,* and *State v. Hoff,* stand for the position that if the defendant does not address the claim the Court of Appeals cannot. This is completely contrary to the rules and case law. The fact that the Court addressed the issue without prompting only lends the to credibility that the proceedings lacked the necessary appearance of fairness.

The second position the State takes in citing to *State v. Carter*, *State v. Bilal,* and *State v. Newbern,* is that there is no difference between

actual bias and a potential for bias. The State completely misses the point of the appearance of fairness doctrine with this line of reasoning. The wealth of case law discussing the appearance of fairness doctrine encompass a broader view than merely whether any actual bias exists.

"The law goes farther than requiring an impartial judge; it also requires that the judge *appear* to be impartial." *State v. Madry*, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972). The doctrine seeks to prevent "the evil of a biased or potentially interested judge or quasi-judicial decisionmaker." *State v. Post*, 118 Wn.2d 596, 619, 826 P.2d 172, 837 P.2d 599 (1992). Generally, the appearance of fairness doctrine requires the court to inquire as to how the proceedings would appear to a reasonably prudent and disinterested person. *State v. Brenner* 53 Wn. App. 367. (1989).

Clearly the Justices of the Court of Appeals are reasonably prudent and they looked at the proceedings and determined that even though they had no doubt as to Judge Warning or Judge Stonier jurisprudence, nevertheless the proceedings did not have the necessary appearance of fairness.

Conclusion

The State has basically argued that Mr. Kyllo has not presented claims that meet the criteria for discretionary review. Petitioner has cited

to violation of his Constitutional rights under both the State and Federal Constitution on every issue addressed. The Petitioner has made every effort to present his claims to the State Courts. Petitioner has cited to numerous constitutional claims and is serving a sentence of Life Without the Possibility of Parole. The interest of justice certainly support this Court granting the Petition for Discretionary Review.

Respectfully submitted this 4th day of June 2008.

Kenny Kyllo, pro se